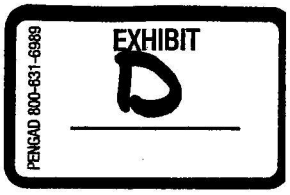

STATE OF NEW HAMPSHIRE
SUPREME COURT

2004 Term
May Session
No. _____

Senator Clifton Below
Representative Peter Burling

v.

New Hampshire Secretary of State

PETITION FOR ORIGINAL JURISDICTION

By: Paul J. Twomey
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E. WHETHER THE STATE OF NEW HAMPSHIRE IS BARRED FROM ENFORCING A REDISTRICTING PROVISION FOR THE NEW HAMPSHIRE HOUSE OF REPRESENTATIVES AND THE NEW HAMPSHIRE SENATE DUE TO FAILURE TO PRECLEAR UNDER SECTION 5 OF THE VOTING RIGHTS ACT OF 1965.

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II. CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

A. New Hampshire Constitution

N.H. Constitution, Part II, Article 9:

"There shall be in the legislature of this state a house of representatives, biennially elected and founded on principles of equality, and representation therein shall be as equal as circumstances will admit. The whole number of representatives to be chosen from the towns, wards, places, and representative districts thereof established hereunder, shall be not less than three hundred seventy-five or more than four hundred. As soon as possible after the convening of the next regular session of the legislature, and at the session in 1971, and every ten years thereafter, the legislature shall make an apportionment of representatives according to the last general census of the inhabitants of the state taken by authority of the United States or of this state. In making such apportionment, no town, ward or place shall be divided nor the boundaries thereof altered."

N.H. Constitution, Part II, Article 11:

"When any town, ward, or unincorporated place, according to the last federal decennial census, has less than the number of inhabitants necessary to entitle it to one representative, the legislature shall form those towns, wards, or unincorporated places into representative districts which contain a sufficient number of inhabitants to entitle each district so formed to one or more representatives for the entire district. In forming the districts, the boundaries of towns, wards and unincorporated places shall be preserved and the towns, wards and unincorporated places forming one district shall be reasonably proximate to one another. The legislature shall form the representative districts at its next session after approval of this article by the voters of the state, and thereafter at the regular session following every decennial federal census."

N.H. Constitution, Part II, Article 26:

"And that the state may be equally represented in the senate, the legislature shall divide the state into single-member districts, as nearly equal as may be in population, each consisting of contiguous towns, city wards and unincorporated places, without dividing any town, city ward or unincorporated place. The legislature shall form the single-member districts at its next session after approval of this article by the voters of the state and thereafter at the regular session following each decennial federal census."

N.H. Constitution, Part II, Article 72-A:

"The judicial power of the state shall be vested in the supreme court, a trial court of general jurisdiction known as the superior court, and such lower courts as the legislature may establish under Article 4th of Part 2."

N.H. Constitution, Part II, Article 74:

"Each branch of the legislature as well as the governor and council shall have authority to require the opinions of the justices of the Supreme Court upon important questions of law and upon solemn occasions."

B. U.S. Constitution

U.S. Constitution, 14th Amendment, Sec. 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Constitution, 14th Amendment, Sec. 2:

"Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

III. STATUTES, ORDINANCES, RULES OR REGULATIONS INVOLVED IN THE CASE

A. Statutes

Chapter 18, Laws of 2004 (HB 1292) (See Appendix)

42 USCS 1973c (See Appendix)

28 CFR § 51.1:

(a) Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, prohibits the enforcement in any jurisdiction covered by section 4(b) of the Act, 42 U.S.C. 1973b(b), of any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on the date used to determine coverage, until either:

(1) A declaratory judgment is obtained from the U.S. District Court for the District of Columbia that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, or

(2) It has been submitted to the Attorney General and the Attorney General has interposed no objection within a 60-day period following submission.

(b) In order to make clear the responsibilities of the Attorney General under section 5 and the interpretation of the Attorney General of the responsibility imposed on others under this section, the procedures in this part have been established to govern the administration of section 5.

28 CFR § 51.22:

The Attorney General will not consider on the merits: (a) Any proposal for a change affecting voting submitted prior to final enactment or administrative decision or (b) any proposed change which has a direct bearing on another change affecting voting which has not received section 5 preclearance. However, with respect to a change for which approval by referendum, a State or Federal court or a Federal agency is required, the Attorney General may make a determination concerning the change prior to such approval if the change is not subject to alteration in the final approving action and if all other action necessary for approval has been taken.

28 CFR § 51.9:

(a) The Attorney General shall have 60 days in which to interpose an objection to a submitted change affecting voting.

(b) Except as specified in § § 51.37, 51.39, and 51.42 the 60-day period shall commence upon receipt by the Department of Justice of a submission.

(c) The 60-day period shall mean 60 calendar days, with the day of receipt of the submission not counted. If the final day of the period should fall on a Saturday, Sunday, any day designated as a holiday by the President or Congress of the United States, or any other day that is not a day of regular business for the Department of Justice, the Attorney General shall have until the close of the next full business day in which to interpose an objection. The date of the Attorney General's response shall be the date on which it is mailed to the submitting authority.

B. Other

HB 264, 2004
HB 264 Docket
Journal of the 1964 Constitutional Convention
Detailed Comparison of NH House District Plans for 2002 and 2004
Summary of NH State Senate District Plans for 2002 and 2004
Detail of 2002 and 2004 NH State Senate Districts Challenged by HB 264

IV. STAGE OF THE PROCEEDINGS

This Petition requests that this Court forbid the Defendant from conducting any portion of the 2004 and subsequent elections under any districting or apportionment scheme other than that mandated by this Court's Orders in Below v. Gardner, 148 NH 1 (2002) and Burling v. Chandler, 148 NH 143 (2002) until after the next decennial federal census.

There have been no lower court proceedings at which the questions presented were raised. This is a petition for original jurisdiction seeking declaratory and injunctive relief to prevent the respondent from engaging in redistricting the House and Senate of the State of New Hampshire pursuant to two new laws that violate Part II, Articles 9, 11, and 26 of the New Hampshire Constitution and the 14th Amendment to the United States Constitution.

Two pieces of legislation are on the verge of final enactment that would create a new legislative apportionment scheme in New Hampshire. Chapter 18, Laws of 2004 (HB 1292) (hereinafter referred to as "HB 1292") has been fully enacted since April 5, 2004 and operates to redistrict the House of Representatives. (See HB 1292 Docket in Appendix). HB 1292 indicates that its terms become effective either sixty days from the date of enactment (June 4, 2004, two days after the commencement of the filing period) **or** immediately upon enactment of HB 264, which is a bill to redistrict the state senate districts. HB 264 has been passed by both branches of the legislature, but has not been acted upon by the Governor as of early this morning. (See HB 264 Docket in Appendix). There is no way to ensure that the bills will not be placed into effect immediately before the commencement of the filing period, thus necessitating the filing of this petition at this time in order to avoid irreparable damage to the elective process.

V. STATEMENT OF THE CASE.

Petitioners hereby seek that this Court exercise its original jurisdiction so as to prevent an unconstitutional redistricting from going into effect in violation of Part II, Articles 9, 11, and 26, as well as in violation of this Court's rulings and orders in the cases of Below v. Gardner, 148 NH 1 (2002) and Burling v. Chandler, 148 NH 143 (2002).

In the year 2002, the legislature of the state of New Hampshire failed to meet its constitutionally mandated duty to pass a reapportionment bill in the "regular session following each decennial federal census", as required for the state Senate by the terms of Part II, Article 26, and for the House of Representatives by the terms of Part II, Articles 9 and 11. Responding to this failure, a number of representatives and senators of the minority party filed

two petitions for original jurisdiction in the Supreme Court, asking the Court to perform the constitutionally mandated duty of reapportionment that the legislature had failed to perform.

The court accepted jurisdiction and in two seminal rulings performed the legislative function of redistricting the state for the Senate (Below v. Gardner, *supra*) and for the House of Representatives (Burling v. Chandler, *supra*). In both cases the court made clear that it was reluctantly performing what was essentially a legislative task solely because the legislature had failed to act in the constitutionally mandated period. Thus in Burling, the Court noted:

> This court has been drawn reluctantly into what is primarily a legislative task. It is not our function to decide the peculiarly political questions involved in reapportionment, but it is our duty to insure the electorate equal protection of the laws. Silver v. Brown, 405 P.2d 132, 140 (Cal. 1965). Therefore, when the legislature has failed to act, it is the judiciary's duty to devise a constitutionally valid reapportionment plan. See Scott v. Germano, 381 U.S. 407, 409, 14 L.Ed.2d 477, 84 S.Ct. 1525 (1965) (per curiam.)"

(at p. 144).

Likewise, in Below, the Court stated, "This task has fallen to the court because the New Hampshire Legislature failed to enact a new district plan for the New Hampshire Senate following the 2000 census." (at p. 3).

The failure to redistrict arose because of a split between the Republican legislature and the Democratic Governor. (See Below, at p. 3). In the ensuing election of 2002, the Republican Party retained the majority in both houses of the legislature and regained the Governor's position. Given their newly unbridled power, and apparently not satisfied with the large majorities they currently enjoy in both branches of the legislature, the majority party has passed legislation seeking to reapportion once again. Petitioners here, minority party members of the House and Senate, who were the named petitioners in Below and Burling, herein request the Court to exercise its original jurisdiction to prevent the unlawful

reapportionment in violation of Part II, Articles 9, 11, and 26 of the New Hampshire Constitution.

HB 1292 has been fully enacted since April 5, 2004 and operates to redistrict the House of Representatives. HB 1292 indicates that its terms become effective either sixty days from the date of enactment, which is June 4, 2004 (two days after the commencement of the filing period), **or** immediately upon enactment of HB 264. (See text of HB 1292 in Appendix; and Docket in Appendix.) HB 264 has been passed by both branches of the legislature, but has not been presented to the Governor for signature as of the filing of this petition. (See text of HB 264 in Appendix; and Docket in Appendix).

VI. REASONS FOR ACCEPTING THE PETITION AND WHY THE RELIEF IS OTHERWISE UNAVAILABLE.

The controlling constitutional provisions make it abundantly clear that the legislature is without authority to redistrict at this time. The legislative power and responsibility to redistrict the House of Representatives emanate from the provisions of Part II, Articles 9 and 11 of the New Hampshire Constitution. Article 9 states:

> There shall be in the legislature of this state a house of representatives, biennially elected and founded on principles of equality, and representation therein shall be as equal as circumstances will admit. The whole number of representatives to be chosen from the towns, wards, places, and representative districts thereof established hereunder, shall be not less than three hundred seventy-five or more than four hundred. **As soon as possible after the convening of the next regular session of the legislature, and at the session in 1971, and every ten years thereafter, the legislature shall make an apportionment of representatives according to the last general census of the inhabitants of the state taken by authority of the United States or of this state.** In making such apportionment, no town, ward or place shall be divided nor the boundaries thereof altered. (Emphasis added).

Article 11 reads as follows:

> When any town, ward, or unincorporated place, according to the last federal decennial census, has less than the number of inhabitants necessary to entitle it to one representative, the legislature shall form those towns, wards, or unincorporated places into representative districts which contain a sufficient number of inhabitants to entitle each district so formed to one or more representatives for the entire district. In forming the districts, the boundaries of towns, wards and unincorporated places shall be preserved and the towns, wards and unincorporated places forming one district shall be reasonably proximate to one another. **The legislature shall form the representative districts at its next session after approval of this article by the voters of the state, and thereafter at the regular session following every decennial federal census.** (Emphasis added).

The legislature's authority and mandate to redistrict the Senate flows from the terms of Part II, Article 26 of the New Hampshire Constitution, which states:

> And that the state may be equally represented in the senate, the legislature shall divide the state into single-member districts, as nearly equal as may be in population, each consisting of contiguous towns, city wards and unincorporated places, without dividing any town, city ward or unincorporated place. **The legislature shall form the single-member districts at its next session after approval of this article by the voters of the state and thereafter at the regular session following each decennial federal census.** (Emphasis added).

The clear language of these constitutional provisions limits the authority to redistrict to the regular session of the legislature that follows each decennial census. The Court in Burling and Below acted solely because the time limit for legislative action had expired. Because of a factual error in the population figures for certain wards in Nashua, the Below Court had to issue a supplemental order on July 11, 2002 which addressed the question of whether there existed an ability to further redistrict prior to the session following the next federal census in the year 2010.

> The Senate President asserts that the Nashua City Clerk has indicated that Nashua is likely to adjust its ward boundaries in the future. The Senate President contends that if the city does so, this may greatly increase the total deviation of the Senate Districts 12 and 13. **Senate Districts 12 and 13 are hereby fixed, and will not be affected if the city adjusts its ward**

> **boundaries in the future.** Should the city choose to adjust its ward boundaries in such a way that they no longer coincide with the boundaries between the senate districts, then it will be the responsibility of the appropriate officials to make internal election process accommodations.

In Re Below, 2002 N.H. Lexis 121, 12 (N.H. July 11, 2002) (See Appendix).

Prior to 1964, Part II, Article 26 authorized redistricting of the Senate "from time to time". The Constitutional Convention of 1964 adopted a resolution that replaced this unlimited grant of authority with redistricting authority specifically limited to a single session of the legislature following the federal census every ten years. This temporal limitation of authority thus brought the senate provisions of Article 26 into conformity with the previous temporal limitations relating to House redistricting contained in Articles 9 and 11. In changing the temporal grant of authority, the people of New Hampshire clearly enacted a binding limitation on the frequency of constitutionally allowable redistricting. It cannot be said that this was a meaningless or thoughtless change. In fact an amendment was proposed that would have retained the former language of "from time to time". This amendment failed and the Constitutional Convention and the people of the state chose to limit the ability of the legislature to redistrict to once a decade. (Journal of the 1964 Constitutional Convention, pp 264-73).

Other jurisdictions have considered this question and none have adopted an interpretation of limiting language such as that contained in Articles 9, 11, and 26 so as to allow for redistricting more frequently than once a decade. Numerous states have come to the same conclusion that where the constitution specifies a time frame for redistricting, then by implication, it prohibits states from redistricting at any other time. In 2003, Colorado's Supreme Court held that because their state constitution specified the time for redistricting,

the State may not redistrict at any other time within ten years, even where the first redistricting was done by a court because of the legislature's failure to enact constitutionally acceptable apportionment. Salazar v. Davidson, 79 P.3d 1221, 1240 (Col. 2003) (Article V, Section 44, says that redistricting shall take place: "when a new apportionment shall be made by congress.") The Salazar court noted that more frequent redistricting most likely would have passed constitutional muster if the relevant provision had authorized it "from time to time", precisely the language that was removed from New Hampshire's Part II, Article 26 in 1964. As the court stated in Salazar:

> The phrase "from time to time" means that an act may be done occasionally. Had the farmers wished to have congressional district boundaries redrawn more than once per census period, they would have included the "from time to time" language in the legislative redistricting provision. They did not.

(at p. 1225).

In 1983, California also found that because their state constitution specified when they shall redistrict, it implicitly denied the State from redistricting at other times. Legislature v. Deukmejian, 669 P.2d 17, 22 (Cal. 1983). (Article 21, Section 1 of the California Constitution provides that the State shall redistrict, "[i]n the year following the year in which the national census is taken.") Deukmejian also recounted over seventy-five years of cases in and outside of California that consistently upheld the "once a decade rule." *Id.* at 22-24.

See, also, People ex rel. Mooney v. Hutchinson, 50 N.E. 599, 601 (Ill. 1898) ("Where there are provisions inserted by the people as to the time when a power shall be exercised, there is at least a strong presumption that it should be exercised at that time, and in the designated mode only; and such provisions must be regarded as limitations upon the power"); Denney v. State ex rel. Basler, 42 N.E. 929, 931-32 (Ind. 1896) ("The fixing, too, by the

constitution, of a time or a mode for the doing of an act, is, by necessary implication, a forbidding of any other time or mode for the doing of such act.").

Because the New Hampshire Constitution does not authorize redistricting more than once per decade, and then only at the session following the federal census, this Court should bar the respondent from utilizing any districts other than those previously set by the Court in 2002 until after the next decennial federal census.

Should the court hold that the redistricting is completely barred, this would make it unnecessary to deal with a number of other serious constitutional infirmities occasioned by the legislature's actions. The 14th Amendment to the United States Constitution guarantees that all state legislative districts be apportioned on the basis of population with the goal of effectuating the principle of one person/one vote. Reynolds v. Sims, 377 U.S. 533, 579, 84 S.Ct. 1362 (1964). The proposed 2004 changes would cause the range of deviation for Senate districts to rise from 5.46% under the Court devised plan of 2002 to a deviation range of 9.48%, a 74% increase in inequality. The average deviation would also rise significantly and unnecessarily, from 1.65% to 2.02%. (See Summary of NH State Senate District Plans for 2002 and 2004 in Appendix; and Detail of 2002 and 2004 NH State Senate Districts Changed by HB 264 in Appendix.) Likewise, the new legislation would raise the range of deviation for House Districts from 9.26% to a constitutionally impermissible range of 14.80%, a 55% increase, assuming the use of new ward boundaries and unverified population counts in Nashua, or an overall range of deviation of 27.03%, a 283% increase, assuming the ward boundaries and population counts used by the Court in July 2002. (See Detailed Comparison of NH House District Plans for 2002 and 2004 in Appendix.)

Article 9 requires that House Districts shall be "as equal as circumstances will admit". Article 26 mandates that Senate Districts be "as nearly equal as may be in population". Clearly circumstance will admit more equal districts in both the House and the Senate -- the simple expedient of retaining the present districts does so. Because the proposed laws do gratuitous violence to Part II Articles 9 and 26 of the New Hampshire Constitution, this Court should bar the respondent from following them to any degree.

Another infirmity engendered by the new laws is their failure to comply with the "preclearance" provisions of the federal Voting Rights Act. Section 5 of the Voting Rights Act 1965 requires certain jurisdictions, most of which are located in the South, to prequalify changes to "any voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting." (See 42 USCS 1973c in Appendix). Since November 1, 1968, 10 political subdivisions in New Hampshire have been required to preclear any such changes. Section 5 prohibits enforcement of any such change with respect to voting unless the United States Department of Justice (hereinafter "USDOJ") "preclears" the change as nondiscriminatory or the United States District Court for the District of Columbia determines that the change is not discriminatory. The United States Supreme Court held that Section 5 applies to legislative redistricting but not Court formulated redistricting plans. See McDaniel v. Sanchez, 452 U.S. 130, 138 (1981)

The USDOJ has 60 days after the submission in which to object to changes affecting voting. (See 28 CFR §51.1 in Appendix). A change affecting voting cannot be submitted to the USDOJ untile its "final enactment." (See 28 CFR §51.22 in Appendix). In order to be sure that the USDOJ has sufficient time to complete its review prior to the June 2, 2004 statutory filing period for candidates, a senate redistricting law had to be submitted to the

USDOJ on or before April 2, 2004. (See 28 CFR §51.9 in Appendix). Because no senate redistricting law has been finally enacted, no valid submission has been made to the USDOJ.

Another constitutional problem arises in at least one instance where the new redistricting scheme fails to follow the census blocks enumerated in the 2000 Census in setting district boundaries. Nashua Census Tract 111, Block 1003, which contained 1,019 persons in the 2000 Census, was like all other census blocks left whole in the Court's 2002 redistricting plan. For no apparent reason and in violation of the 14th Amendment to the United States Constitution and Part II, Articles 9, 11 and 26 of the New Hampshire Constitution, the legislature's 2004 attempt at redistricting utilizes wards modified since July 2002 that split a census block into two parts, the population of which cannot be determined with certainty or in accordance with an official federal or state census. Aside from constitutional infirmity, this action is a direct violation of the Court's Order of July 11, 2002 in Below which explicitly stated that if Nashua adjusted its ward lines subsequent to the Court's order, such new ward boundaries could not be used to alter or affect Senate district boundaries which were fixed by the Court's order.

VII. JURISDICTIONAL BASIS FOR THE PETITION

Petitioners seek urgent and expeditious review of the constitutionality of the legislature's actions under the original jurisdiction of this Court, which has utilized original jurisdiction to review apportionment questions ever since the Federal and State constitutions were first interpreted or amended to recognize the principle of one person/one vote in the mid-1960's. Levitt v Maynard, 105 N.H. 447, 202 A.2d. 478 (1964); Monier v. Gallen, 122 N.H. 474, 446 A. 2d. 454 (1982); Burling, *supra;* Below, *supra*. In Monier v. Gallen, the court

noted that, under Part II, Articles 72-A and 74 of the New Hampshire Constitution, the fundamental charter of the Supreme Court states that the "judicial power of the state shall be vested in the Supreme Court..." The Monier v Gallen court went on to state that the circumstances attendant to the political realities of reapportionment make the exercise of original jurisdiction a "particularly appropriate action when the parties desire and the public need requires a speedy determination of the important issues in controversy" (at p. 475). (See also, Petition of Monier , 143 N.H.128, 719 A.2d 626, 630 (1998)).

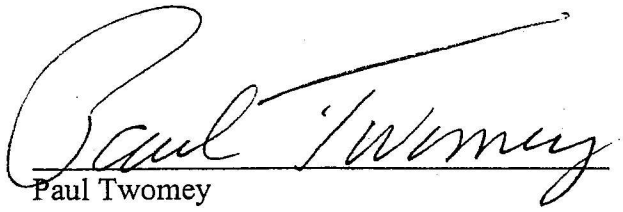
In the instant case time is again of the essence, making a resort to lower courts futile—the filing period for the State primary election begins in less than a week on June 2 and closes on June 11; the primary is set for September 14, and the general election is set for November 2, 2004. It will be impossible for individuals to make reasoned decisions on whether to run for office in the absence of a ruling of this Court determining which districting scheme is in effect. Given the gravity of the constitutional principles at stake, as well as the extremely limited period of time available, it is critical that this Court again exercise its original jurisdiction in order to protect the constitutionally mandated apportionment structure from political mischief of the highest order.

VIII. PARTIES AND COUNSEL

The Plaintiffs in this action are Senator Clifton Below and Representative Peter Burling, who are represented by Paul Twomey, Esq. Attorney Twomey's address is P.O. Box 635, Epsom, NH 03234 and his phone number is 491-2966.

The Defendant is represented by the New Hampshire Attorney General Peter Heed, whose address is 33 Capitol Street, Concord, NH 03301, with a phone number of 271-3658.

Respectfully submitted,



DATED: May 27, 2004

Paul Twomey
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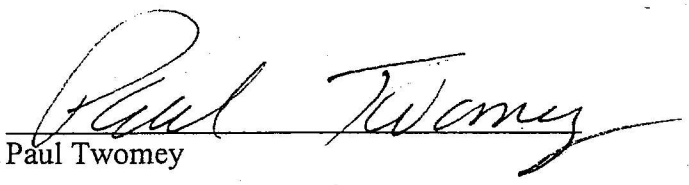
CERTIFICATE OF COMPLIANCE

I hereby certify that copies of the forgoing have been served this 27th day of May, 2004 in person upon the Office of the Secretary of State, and the Office of the Attorney General, and filed with the Clerk in accordance with Rule 11 (5) and Rule 26 (2), (3) and (4).



Paul Twomey